80-187

Supreme Court, U. S.
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THE SUPREME COURT
OF THE UNITED STATES

October Term 1980

Joseph C. Rush, M.D., Petitioner

vs.

Bayfront Medical Center, Inc., Respondent

On Petition For Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

HARRIS, BARRETT AND DEW

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1980

Joseph C. Rush, Petitioner

vs.

Bayfront Medical Center, Inc., Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT
OF THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Joseph C. Rush, M.D., the petitioner herein, prays that a writ of certiorari issue to review the decision of the Circuit Court for the Fifth Circuit, entered in the above-entitled case on May 2, 1980.

QUESTION PRESENTED

Did the lower court err in affirming the trial court's dismissal of the complaint with prejudice for lack of jurisdiction on the basis that the complaint

failed to allege sufficient facts to establish the existence of "state action" for jurisdictional purposes of 42 U.S.C. § 1983.

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O'Neill v. Grayson County War Memorial Hospital 472 F. 2d 1140 (6th CCA 1973).

Weise v. Syracuse University, 522 F. 2d 873 (5th CCA 1975).

STATUTES INVOLVED

28 U.S.C. § 1343 (1976) as amended Dec. 29, 1979, Pub. L. 96-170, § 2, 93 Stat. 1284. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance,

regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 2101(c) (1959). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for

a writ of certiorari for a period not exceeding sixty days.

42 U.S.C. § 1983 (Supp. 1980) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a

statute of the District of Columbia.

OPINIONS BELOW

The opinion of the District Court, Middle District of Florida is unreported and is printed in Appendix hereto, infra page 25. The opinion of The United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix hereto, infra, page 34.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on May 9, 1980. Petitioner did not file a petition for hearing en banc or rehearing. The jurisdiction of the court is invoked under 28 U.S.C. § 2101(c).

STATEMENT

Petitioner, Joseph C. Rush, Jr., M.D., is a certified radiologist who has practiced medicine as an active staff member at respondent since its creation in 1968. Respondent, Bayfront Medical Center, Inc., is a non-profit corporation organized under the laws of the State of Florida. The City of St. Petersburg, Florida, owned and operated a municipal hospital under the name, Mound Park Hospital, until October 1, 1968, at which time it leased the premises to respondent for a term of twenty-five years.

Respondent created a new Oncology Center at its facility in 1978 and began offering outpatient radiation therapy treatments shortly thereafter. Petitioner initiated the instant lawsuit on November 17, 1979, challenging the

procedures and policies developed by respondent governing staff privileges at the Oncology Center. Petitioner alleged in his complaint that these policies and procedures operated to substantially reduce his staff privileges without adherance to the procedural requirements of respondent's by-laws concerning reduction of staff privileges. Petitioner's staff privileges were allegedly reduced by respondent's appointment of a non-staff member, Dr. Ralph Johnson, as head of the Oncology Department, automatic assignment of all unassigned cases to the new head of the department unless the patient specifically requested another doctor, and creation of arbitrary and unreasonable regulations concerning staff membership of the Oncology Department which operated to qualify Dr. Johnson to the exclusion of all other

doctors.

Petitioner sought jurisdiction for the complaint under 28 U.S.C. § 1343 and its collateral statute, 42 U.S.C. § 1983. Petitioner set forth nine facts in his complaint to satisfy the requirement of "state action" by respondent. The allegations were as follows:

1. The City of St. Petersburg, Florida, leases the premises upon which respondent is located to respondent pursuant to a written lease for 25 years for $10.00 a year.

2. The City of St. Petersburg agreed in the lease to continue administering a capital improvement fund at respondent's premises after the date of respondent's occupation.

3. The City of St. Petersburg continues to repair and improve the property since the date of transfer in derogation of the terms of the contract.

4. The City of St. Petersburg will retain title to any proceeds remaining in respondent's capital improvement fund, its operating funds, equipment, supplies, personalty and improvements at the termination of the lease.

5. The City of St. Petersburg may inspect the property and make recommendations as to changes in respondent's budget.

6. Respondent could recommend priorities for expenditures of the City of St. Petersburg's capital improvement fund.

7. Respondent may not assign the lease or sublet the premises without the prior consent of the City of St. Petersburg.

8. Respondent continues to make requests for the City of St. Petersburg's aid for future improvements.

9. The City of St. Petersburg will receive a direct benefit from the violation of petitioner's constitutional rights because the monopoly between respondent and Dr. Johnson permits unrestrained and uncompetitive charges to patients which will result in greater profits for respondent which will be eventually returned to the City of St. Petersburg.

Respondent moved to dismiss the complaint for lack of jurisdiction on the basis that these facts failed to establish "state action" by respondent. The respective counsels filed Memoranda of Law as to their positions. The district court entered an order on November 15, 1979, dismissing the complaint with prejudice for lack of jurisdiction on December 14, 1978.

Petitioner and respondent timely

filed their respective briefs before the United States Court of Appeals for the Fifth Circuit. The court rendered its decision on May 9, 1980, affirming the lower court per curiam without opinion. This petition for a writ of certiorari follows that decision.

REASONS FOR GRANTING THIS WRIT

Petitioner seeks this writ of certiorari under Sup. Ct. R. 17(a)(c), 48 L.W. 4344 (1980) on the basis that the decision of the United States Court of Appeal for the Fifth Circuit conflicts with decisions of other federal courts of appeal in the same matter. The trial court held that petitioner had not alleged sufficient facts in its complaint to establish that respondent's activities were imbued with "state action". Petitioner appealed this singular point to the court of appeal which upheld the

decision without opinion. Petitioner submits that the facts alleged in its complaint would be held by other federal courts of appeal to be sufficient to establish the jurisdiction requirement of state action by respondent. The federal courts of appeal have rendered conflicting decisions on very similar facts as to the establishment of state action.

The trial court dismissed the complaint with prejudice on the authority of Greco v. Orange Memorial Hospital Corporation, 513 F. 2d 873 (5th CCA 1975). Petitioner concedes that the factual situation in the instant case is very similar to those present in Greco. The purpose of this petition, however, is to request the court to grant a writ of certiorari so that the test for establishment of "state action" by a private hospital may be unified. A reading of the

Greco decision reveals that the United States Court of Appeals for the Fifth Circuit applies a substantially more stringent test for "state action" by a private hospital than do other courts of appeal. The Greco court specifically declared that it would use a more stringent test for "state action" where the hospital is not accused of racial discrimination, 513 F. 2d at 879, 882. The United States Court of Appeals for the Second Circuit has also adopted a flexible test to state action issues based on the presence or lack of presence of racial discrimination, Weise v. Syracuse University, 522 F. 2d 397 (2d CCA 1975).

The more stringent "state action" test for non-racial discrimination cases conflicts with decision of this court and other federal courts of appeal. The court in Downs v. Sawtelle, 574 F. 2d 1 (1st CCA 1978), rejected the application of the less stringent test in a case involving an involuntary sterilization at a

private hospital. The hospital in Downs cited Greco as authority for the position that partial governmental funding and state regulation did not transform a private hospital into a state action. The Downs court partially distinguished Greco as controlling authority because of the latter court's statement concerning a more stringent test for state action upon a lack of racial discrimination, 574 F. 2d at 7, Fn. 7. Petitioner would point out that the trial court ruled that Greco as opposed to Downs controlled the instant factual circumstances. Petitioner contends that the conflict is clear between the federal circuit courts of appeal concerning the test to be applied for state action in non-racial discrimination suits against private hospitals.

Petitioner argues that this court has previously declared one test for

state action in all cases. The court in Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed 2d 477(1974), considered whether state action was involved in a utility company's termination of electric service for the nonpayment of bills. The court used Burton vs. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed 2d 45 (1961) and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), as lines of demarcation of state action in Jackson. Burton and Moose Lodge each involved racial discrimination while Jackson did not contain even a hint of racial discrimination. The test for state action pursuant to Jackson is the same whether the case does or does not involve racial discrimination. The court should issue a writ of certiorari in order to

resolve these conflicts in the various federal circuit courts of appeal.

Petitioner also contends that conflict exists between the federal circuit courts of appeal as to whether a nexus must exit between the governmental authority and the challenged activity. The Greco court relied upon by the trial court specifically noted that the governmental authority retained no power to amend the challenged activity, 513 F. 2d at 881. The court failed to find a nexus between the involvement and the activity and found no state action despite the acknowledgment of governmental involvement and interest, Id. Other federal courts of appeal have held that "state action" may be established by governmental financial support of and contractual relations with the private hospital regardless of a nexus between

that support and the challenged activity.

The court in Downs v. Sawtelle, 574 F. 2d at 9, has seen through the Greco maze and held that the relationship between the governmental agency and the private hospital may be so intertwined that the activity with which the government had no direct connection will be considered state action. The court held that state action existed although there was absolutely no connection to the challenged activity because the governmental agency appointed the hospital's board of directors, gave general governmental support to the hospital, generally regulated the hospital received profits and would recover the hospital assets upon dissolution. Petitioner's complaint would be sufficient under the Downs test since it alleges facts which would, if proven, show a general continued

relationship and support by the City of St. Petersburg. These factors are set out in the statement of the case.

The court in Eaton v. Grubbs, 329 F. 2d 710 (4th CCA 1964), also held that state action was established without any showing of relationship to the challenged activity. The relationship was primarily one of continued general financial support to an allegedly private hospital. Eaton did not even involve the lease of property, but rather, a donation of property with a reverter clause.

Petitioner would also point out the decision of O'Neill v. Grayson County War Memorial Hospital, 472 F. 2d 1140 (6th CCA 1973), in which state action was also established without showing a direct relationship of the government and the challenged activity. The relationship between the hospital and the governmental

agency in O'Neill was almost identical to the instant factual circumstance with the exception of the existence of Hill-Burton Act funds.

Petitioner would point out that the lease between respondent and the City of St. Petersburg contains specific restrictions on rate structure, composition of the Board of Trustees, approval of by-laws and numerous other restrictions. Respondent and the City of St. Petersburg are sufficiently intertwined so as to establish state action by respondent under the rulings of several federal circuit courts of appeal. The court should issue a writ of certiorari to review this decision and resolve the conflicts concerning the test for state action of private hospital. Federal court jurisdiction is especially important in cases such as the instant

one where the hospital executes autocratic power to create monopolistic, uncompetitive medical practices in a day where medical costs increase constantly. A writ of certiorari should issue for the above reasons.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
Case No. 78-1031 Civ. T-WC

JOSEPH C. RUSH, M.D., :

Plaintiff, :

vs. :

BAYFRONT MEDICAL CENTER, INC., a Florida non-profit corporation, :

Defendant. :

FILED
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DISTRICT COURT
NOV 15 1205 PM'79
MIDDLE DISTRICT
OF FLORIDA
TAMPA, FLORIDA

O R D E R .

The Court has before it defendant's motion to dismiss for lack of jurisdiction and, alternatively, for failure to state a claim. Also pending is plaintiff's motion to compel answers to interrogatories.

Plaintiff, Joseph Rush, M.D., is a certified radiologist who has practiced at the Bayfront Medical Center in St. Petersburg, Florida, since 1968. He has enjoyed and apparently still has staff privileges at the Medical Center. His

complaint centers around an alleged "exclusive" 1978 agreement that the hospital entered into with a Dr. Ralph Johnson, also a radiologist. This agreement established a program whereby outpatient radiation therapy treatments were offered for the first time at the hospital. Dr. Rush asserts that because of this agreement, his own radiation practice was effectively curtailed or "reduced" without compliance with an administrative hearing that is required under the hospital's by-laws.

The plaintiff attempts to invoke the jurisdiction of this court under 42 U.S. C. 1983 by claiming that his civil rights were violated because the hospital's internal administrative procedures were not followed. He argues that the City of St. Petersburg's involvement with the Bayfront Medical Center was such as to qualify as state action, thereby

subjecting the facility to the requirements of Section 1983. Plaintiff seeks damages and a permanent injunction "preventing defendant's reduction of plaintiff's staff privileges without affording plaintiff the right to due process of law."

The question of what constitutes state action under 1983 has been the subject of considerable debate since the Supreme Court decided the landmark case of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The question has been particularly difficult in regard to hospitals and other forms of public assistance that receive varying degrees of governmental support. In Burton, the Supreme Court, speaking through Mr. Justice Clark, held that the state-owned parking facility and the restaurant involved were so inextricably interdependent that the state agency was

a joint participant in the operation of the restaurant:

> The State has so far insinuated itself into a position of interdependence with (the restaurant lessee) that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

365 U.S. at 725.

In Greco v. Orange Memorial Hospital, 513 F. 2d 873 (5th Cir. 1975), the Fifth Circuit considered the state action concept in regard to hospitals receiving varying degrees of public assistance from city and state governments. There the court held that the relationship of Orange County, Texas, to a local hospital was not sufficient to qualify as state action. In Greco the hospital leased all of the land and at least some of the hospital's buildings from the county for the sum of one dollar per year. The

hospital agreed to bear responsibility for the daily affairs of its operations, to have all equipment inventoried in a manner approved by the county, to make additions to the hospital only with the written consent of the county, and to furnish any information desired by the county relating to the hospital operations. The Fifth Circuit stated that "the district court correctly held that a private hospital is subject to the provisions of 42 U.S.C. 1983 and the 14th amendment only if its activities are significantly affected with state involvement." 513 F. 2d at 877.

A First Circuit case heavily relied upon by plaintiff did find the presence of state action by the City of Milo, Maine, in the operation of a hospital in that town. Downs v. Sawtelle, 574 F. 2d 1 (1st Cir. 1978), cert. denied,

99 S. Ct. 278 (1978). The First Circuit in Downs attempted to reconcile Greco with Burton and found that the "State has so insinuated itself into a position of interdependence with (Milo Community Hospital) that it must be recognized as a joint participant in the challenged activity . . ." Id. at 6, quoting Burton, supra, at 725. The following illustrates the intertwined relationship between Milo, Maine and the hospital:

> The involvement of the state in the operation of Milo Community Hospital is multi-faceted. Thirty percent or more of its operating budget resulted from Medicare funds. The hospital was subject to significant governmental regulation. The entire board of directors subsequent to the original incorporators was appointed by the Board of Selectmen of the town of Milo. Any profits earned by the hospital are to be distributed to the town of Milo. If the hospital should be dissolved, all assets after payment of debts revert to the town of Milo.

Downs, 574 F. 2d at 7.

The Downs court examined Greco and stated that the state involvement there was of considerably less magnitude than in Downs. The most compelling factor in finding state invovlement, stated the First Circuit, was that the City had the power to appoint the hospital's board of directors. Id.

While the issue here is indeed a close one, I find that the case at bar is more akin to the situation in Greco than to that in Downs. St. Petersburg does grant the hospital certain privileges. The City leases the premises upon which the hospital sits for $10 a year. St. Petersburg retains title to any proceeds remaining in the hospital's capital improvement fund at the end of the lease (see paragraph 19 of the lease), and it retains certain profits from operating funds, equipment, and remaining stock.

The City retains the right to make recommendations for expenditures for capital improvements, and they may employ a consultant to inspect the leased premises and make suggestions for repairs. However, virtually all of these controls were present in Greco, and they are not unusual in a typical lessor/lessee relationship.

The City did not and does not control or appoint the hospital's board of directors. It does not attempt to inject itself or its policies into the hospital's operations and St. Petersburg had no involvement in the dispute at hand. Although the City offers some assistance to the hospital for repairs and improvements, the hospital has the primary responsibility for such activity. The City does not retain a substantial ownership interest in the hospital as

did Milo, Maine in the Downs case.

Consequently, the Court finds that the requisite state action under 1983 is lacking. The defendant's motion to dismiss for lack of jurisdiction should be, and it is, GRANTED. The motion to dismiss for failure to state a claim and plaintiff's motion to compel are hereby rendered MOOT. This cause stands DISMISSED with prejudice.

IT IS SO ORDERED at Tampa, Florida, this 15 day of November, 1979.

s/Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-4004
Summary Calendar*

JOSEPH C. RUSH, M.D.,

Plaintiff-Appellant,

versus

BAYFRONT MEDICAL CENTER, INC.,
a Florida non-profit corp.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(MAY 9, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

[1]See N.L.R.B. v. Amalgated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

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CASE NO. 80-187

THE SUPREME COURT
OF THE UNITED STATES

October Term 1980

Joseph C. Rush, M.D., Petitioner

vs.

Bayfront Medical Center, Inc., Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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STATEMENT OF THE CASE

In November of 1978, Petitioner, a radiologist, sued Respondent, a private hospital organized and existing under the laws of the State of Florida as a non-profit corporation, in federal court for damages and an injunction resulting from an alleged violation of his right to due process under the Fourteenth Amendment (R. 1-5). The factual basis of Petitioner's claim (as opposed to his jurisdictional allegations) is found in paragraphs 1 through 14 of his compliant (R. 1-3). The District Court's order granting Respondent's Motion to Dismiss, succinctly summarized much of Petitioner's complaint:

> Plaintiff, Joseph Rush, M.D., is a certified radiologist who has practiced at the Bayfront Medical Center in St. Petersburg, Florida, since 1968. He has enjoyed and apparently still enjoys staff privileges at the Medical Center. His complaint centers around an alleged "exclusive" 1978 agreement that the hospital entered into with Dr. Ralph

> Johnson, also a radiologist. This agreement established a program whereby outpatient radiation therapy treatments were offered for the first time at the hospital. Dr. Rush asserts that because of this agreement, his own radiation practice was effectively curtailed or "reduced" without compliance with an administrative hearing that is required under the hospital's by-laws. (R. 95).

Other pertinent facts set forth in paragraphs 1 through 14 of Petitioner's complaint are that the Respondent has been in existence since July of 1968, at which time it entered into a lease with the City of St. Petersburg, whereby the City-owned property and buildings formerly operated by the City as Mound Park Hospital were leased to Respondent for a term of thirty years.

Petitioner alleged jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §1343. As set forth in paragraph 15 of the complaint (R. 3-5), the facts relied on to establish jurisdiction are as follows:

1. The City leased to Respondent the property and premises it formerly operated as Mound Park Hospital for ten dollars a year.

2. Pursuant to the lease, Respondent agreed to continue administering funds for capital improvements previously approved by the City.

3. Although Respondent has responsibility under the lease for making repairs, the City has aided Respondent in making capital improvements and Respondent continued to request such aid.

4. The City can employ a consultant to inspect the leased premises and make recommendations concerning Respondent's budget with respect to maintenance and repair. Respondent must give due consideration to these recommendations. [emphasis supplied]

5. Respondent can recommend priorities for the expenditure of the capital

improvement fund and the City must consider these recommendations and not unreasonably reject them. [emphasis supplied]

6. Respondent may not assign or sublet the leased premises without the prior consent of the City.

7. The title to Respondent's assets will vest in the City upon termination of the lease.

Petitioner further alleged that the violation of his constitutional right to due process directly benefits the City because Respondent will receive greater profits as a result of its contract with Dr. Johnson and these profits will be returned to the City as part of Respondent's assets (R. 3-5).

A fact not alleged by Petitioner in his complaint is that the lease requires Respondent to be responsible for the management of the hospital (R. 11).

The parties conducted pre-trial discovery prior to the rendition of the order dismissing the case against Respondent for lack of subject matter jurisdiction under Section 1983. Of significance for purposes of jurisdiction under Section 1983 are Respondent's answers to Petitioner's interrogatories (R. 66-71). The following jurisdictional facts were established by Respondent's answers:

1. The only improvements which have been made by the City to the leased premises were those started by the City prior to the effective date of the lease. The City completed those (R. 66).

2. The City has not made any repairs to the leased premises since the inception of the lease (R. 66).

3. Respondent submitted a ten year plan to the City for its consideration in its 1979/80 Budget for the construction of certain improvements and repairs to

the premises (R. 67).

4. Respondent borrowed $2,000,000 from the City for the construction of certain improvements. Repayment is required. (R. 67).

5. The City allocated $1,200,000 of Federal Revenue Sharing Funds to Respondent in 1973. In 1977 the City supported Respondent's application for U.S. Economic Development Administration Grant Funds and Respondent was awarded about $1,300,000 (R. 68).

6. The City has not made any recommendations to Respondent concerning changes in Respondent's budget with respect to additional maintenance and repair for the leased premises (R. 67).

7. Respondent has not made any recommendations to the City concerning the expenditure of the Capital Improvement Fund referred to in paragraph 15(B) of Petitioner's complaint (R. 69).

8. No Capital Improvement Fund pursuant to paragraph 19 of the lease exists because the capital equipment, additions and improvements made by Respondent have exceeded Respondent's income accumulated over its eleven years of operation (R. 69).

9. The regulations specifying the qualifications required of all radiologists, referred to in Petitioner's complaint, were developed jointly by Robert Hoffman, M.D. and Ralph E. Johnson, M.D. These regulations were approved by Respondent's Standards and Credentials Committee, Medical Council, and Board of Trustees. Qualifications for staff privileges in the Respondent's Oncology Center are also contained in the Operational Policies for the Section of Radiation Oncology. These policies were approved by Respondent's Medical Council and its Board of Trustees (R. 70-71).

The District Court entered an order on November 15, 1979, dismissing the complaint with prejudice. Petitioner appealed to the United Stated Court of Appeals for the Fifth Circuit. On May 9, 1980, the Fifth Circuit affirmed the District Court's judgment per curiam without opinion. Petitioner filed his Petition for Writ of Certiorari in this Court on July 31, 1980. Respondent hereby files this brief in opposition thereto.

SUMMARY OF ARGUMENT

Petitioner has not shown sufficient grounds for granting conflict certiorari.

The decisions of this Court do not preclude considering allegations of racial discrimination in deciding threshold questions of state action. Nor does the fact that the Fifth Circuit in Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir. 1975), cert. denied, 423 U.S. 1000 (1975), recognized racial discrimination as a factor to be considered in deciding state action issues support Petitioner's contention that the Fifth Circuit applies a substantially more stringent test in matters of state action when racial discrimination is not involved than do other federal courts of appeals. On the contrary, if anything, other federal courts of appeals, including the First Circuit in Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978),

cert. denied, 439 U.S. 910 (1978), so heavily relied upon by Petitioner, have indicated a willingness to consider or do in fact consider allegations of racial discrimination as a factor to be considered in deciding state action issues.

Petitioner's argument with respect to a conflict on the issue of the requirement of a governmental "nexus" with the challenged activity is equally without merit. Not only has Petitioner failed to reference any federal court of appeals decision which rejects this approach, this approach was specifically adopted by this Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Finally, the writ should not issue because neither the allegations of the complaint, nor the facts adduced via pretrial discovery, would support a finding of state action. There was no governmental nexus with the challenged activi-

ties per Jackson. Nor was there the symbiotic relationship between the City of St. Petersburg and Respondent, which served as the basis for this Court's holding in Burton v. Wilmington Packing Authority, 365 U.S. 706 (1961) and the First Circuit's holding in Downs v. Sawtelle, supra.

ARGUMENT AGAINST GRANTING THE WRIT

Petitioner has not shown any basis of conflict between the decisions of this Court or other federal courts of appeals on the two issues raised in his brief.

First, Petitioner states that the consideration of allegations of racial discrimination as a factor in state action analysis by the Fifth Circuit in Greco and the Second Circuit in Weise v. Syracuse University, 522 F.2d 873 (2nd Cir. 1975), constitutes a conflict with decisions of this Court and other federal courts of appeals. Petitioner neglects to cite a decision of this Court which conflicts with the holdings by the Fifth and Second Circuits on this issue and Respondent has been unable to locate a United States Supreme Court decision which would prohibit giving special consideration to allegations of racial discrimination in the context of state

action determinations.

Respondent would, however, point out to the Court, that the giving of added weight to special circumstances has not been prohibited by this Court. The discussion of state action in Jackson shows that the Supreme Court indeed adheres to the proposition of "differences in circumstances beget differences in law." 419 U.S. 345, 358. A special circumstance considered in Jackson was the assertion by the petitioner therein that the private entity performed a "public function," which would in effect subject it to less scrutiny for purposes of state action analysis.

With respect to state action analysis at the federal court of appeals level, the only case that Petitioner uses as authority as a basis for a conflict on whether it is proper to give special consideration to allegations of racial

discrimination is the First Circuit's decision in Downs v. Sawtelle, supra. Petitioner maintains that the Downs court rejected the application of a "less stringent test" in a case involving an involuntary sterilization. Respondent disagrees with Petitioner's analysis of Downs. In footnote 5 of the opinion, the court states that it had previously (in an earlier case) "expressed [its] reservation" to an approach providing for less scrutiny in racial discrimination cases. More important, for purposes of deciding whether a conflict exists, the First Circuit left open the question of whether it would adopt such an approach in the future. Footnote 5 continues:

> Even if we were to adopt such an approach, however, we would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases.

Likewise, in specifically dealing with

the Fifth Circuit's Greco decision, the Downs court, in footnote 7 at page 7 of the opinion stated:

> As we have noted,. . . we would, in this setting, equate racial discrimination with deprivation of a fundamental right for purposes of state action analysis.

These statements hardly constitute a conflict with the Fifth and Second Circuits' positions as expressed in Greco and Wiese. The issue of the propriety of using a less strict test in the context of racial discrimination cases was not presented to the Downs court and the court did not rule on it. Furthermore, the court's language suggests that it would consider applying such an approach and would even expand its application.

Not only has the First Circuit Court not rendered a decision in conflict with the positions taken by the Fifth and Second Circuits, the Ninth Circuit in Aasum v. Good Samaritan Hospital, 542

F.2d 792, 794 (9th Cir. 1976), also applies a less rigorous standard in cases involving allegations of racial discrimination, and the Eighth Circuit in Brisco v. Bock. 540 F.2d 392, 396 at n. 3 (8th Cir. 1976), indicated that it too would apply such a test in cases of racial discrimination for jurisdictional purposes under Section 1983. As stated by the District of Columbia Circuit in Spark v. Catholic University of America, 510 F.2d 1277, 1281-82 (D.C. Cir. 1975):

> If any principle emerges from these cases, it would appear to be that, at least where the question of race is not involved, it is necessary to show that the Government exercises some form of control over the actions of the private party.

An even weaker contention is that a conflict exists as to whether a nexus must be present between the governmental authority and the challenged activity. Petitioner asserts that the Downs court saw through the "Greco maze" and found

state action despite no governmental connection with the act complained about.

A review of the Greco decision shows that the court correctly analyzed the facts presented to it pursuant to the dictates of Burton v. Wilmington Parking Authority, 365 U.S. 706 (1961). Since the Greco court was presented with "non-obvious involvement of the state in private conduct," it searched for facts showing a symbiotic relationship akin to that found in Burton, and found, on balance, insufficient facts to meet that test. Greco v. Orange Memorial Hospital Corp., 513 F.2d 873, 878, 880-81 (5th Cir. 1975), quoting Burton at 722. In short, the Greco court's analysis can hardly be termed, as Petitioner suggests, a deviation from the pronouncements of this Court on state action.

Likewise, the First Circuit in Downs was presented with nondirect state involve-

ment. While, as pointed out by Petitioner, the First Circuit found state action despite the fact that the town of Milo did not involve itself directly in the involuntary sterilization, it did so because,

> the "State [had] so insinuated itself into a position of interdependence with [Milo Community Hospital] that it must be recognized as a joint participant in the challenged activity" . . . .

Id. at 6, quoting Burton at 725. In making its finding of state action, the analysis of the court is important because it shows, contrary to what Petitioner asserts, that Petitioner's compliant would be deficient under the test applied in Downs.

In Downs, the court characterized Greco as having "state involvement of considerably less magnitude" than the factual situation presented to it for review. 574 F.2d at 7. The court specifically noted that the most compelling

factor which militated towards a finding of state action was the power of the town to appoint the hospital's board of directors, a fact conspicuously absent from the present case, and noted by the District Court in the opinion below. As pointed out in Respondent's statement of the case, the lease between the City of St. Petersburg and Respondent requires that Respondent be responsible for managing the hospital. Petitioner's complaint does not even allege that the City of St. Petersburg controls the management of the hospital. Likewise, Petitioner's complaint does not allege, nor were facts revealed during discovery, that the City was involved in this dispute at hand, a fact also noted by the District Court in its opinion. Obviously, the District Court considered the instant case in light of the nexus approach set forth in Jackson and the interdependent/symbiotic

approach set forth previously in Burton, as did the Fifth Circuit, as pointed out previously, in Greco. See also Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976), cert. denied, 429 U.S. 872 (1976), wherein the reasoning of the court shows that is considered the factual situation in terms of both Jackson and Burton.

For purposes of deciding whether a conflict exists on the nexus issue, it should also be pointed out to the court that the First Circuit court devoted a portion of its opinion in Downs to the requirement of a nexus, and, in doing so, logically harmonized Burton (wherein the nexus requirement was not discussed) and Jackson (where it was):

> If this nexus analysis was required to establish state action in any context, Burton, which based its holding on purely passive state involvement, would be overruled. However, Jackson specifically reaffirmed Burton's vitality in cases where, after searching scrutiny, a

> true symbiotic relationship can be said to exist.
>
> . . . .
>
> The essence of Burton which survives Jackson is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it has no direct connection.

574 F.2d at 8, 9. It is clear that no conflict exists between the Fifth and First Circuits on this point.

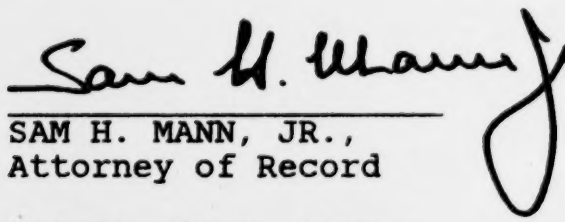
Finally, the other two cases cited by Petitioner, Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964), and O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973), do not address the issue of the requirement of a nexus. Indeed both cases were decided pre-Jackson, where the nexus approach was first announced. Certainly these decisions should not be relied on as authority for a proposition not considered.

CONCLUSION

The writ should not issue because no conflict has been shown between the decisions of this Court or the federal courts of appeal on the issues presented to this Court for consideration. Moreover, the decision of the District Court was in accord with the principles set forth by this Court in Burton and Jackson. Not only was there no nexus between the City of St. Petersburg and Respondent with respect to Petitioner's complaints, there was no showing of a symbiotic relationship between the hospital and the City which would obviate the need for a nexus. The Fifth Circuit was therefore correct in affirming the District Court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 copies of the foregoing Brief in opposition to Petition for Certiorari has been furnished by U.S. Mail to Kenneth C. Deacon, Jr., Post Office Drawer 1441, St. Petersburg, Florida 33731 this 28th day of August, 1980.



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